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Sunset Review
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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Sunset Review of the Antidumping Duty Order on Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results

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Summary

We have analyzed the case brief and the rebuttal comments of interested parties in the sunset review of the antidumping duty order covering certain hot-rolled carbon steel flat products from the Netherlands. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received case brief and rebuttal comments from interested parties:

Comment 1: Whether "other factors" require that the Department consider two recent World Trade Organization ("WTO") determinations with respect to zeroing;

Comment 2: Whether the Department's conclusion in the April 9, 2007 "Issues and Decision Memorandum for the Final Results of the Section 129 Determinations" ("Final Section 129 Determination") to revoke the order undermines the validity of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of the Sunset Review of Antidumping Duty Order, 72 FR 7604 (February 16, 2007) ("Sunset Review Preliminary Results");

Comment 3: Whether the Department's implementation in "Final Section 129 Determination" of WTO rulings pertaining to zeroing undermines the validity of Sunset Review Preliminary Results;

Comment 4: Whether the recalculated weighted-average margin of zero percent for Corus Staal in "Final Section 129 Determination" undermines the "likely margin to prevail" if the order were revoked that was referenced in Sunset Review Preliminary Results;

Comment 5: Whether the Department may rely on the presumptions embodied in Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871, 18872 (April 16, 1998) ("Sunset Review Policy Bulletin");

Comment 6: Whether the Department's decision in "Final Section 129 Determination" to revoke the order means that Corus Staal will not dump in the future;

Comment 7: Whether the Sunset Review Policy Bulletin presupposes a validly issued order and would not apply in the absence of a validly issued order;

Comment 8: Whether the Department may rely on margins calculated in administrative reviews based on zeroing;

Comment 9: Whether domestic producers' withdrawals of administrative review requests prevented meaningful analysis of import and margin trends;

Comment 10: The impact of the Section 201 tariffs on steel product imports;

Comment 11: The significance of declining margins and steady (or rising) imports;

Background

The Department published the antidumping duty order on November 29, 2001 (see Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 59565 (November 29, 2001) ("The Order")).

On August 1, 2006, the Department published its notice of initiation of the first sunset review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands (see "Initiation of Five-year ("Sunset") Reviews", 71 FR 43443 (August 1, 2006)). The Department received a Notice of Intent to Participate from Corus Staal BV ("Corus Staal") on August 8, 2006. The following domestic interested parties each submitted a Notice of Intent to Participate, all within the deadline specified in section 351.218(d)(1)(i) of the Sunset Regulations, identifying themselves as interested parties under 771(9)(c) of the Tariff Act of 1930, as amended ("the Act"):

Nucor Corporation (August 10, 2006)
Gallatin Steel, IPSCO Steel, Inc., and Steel Dynamics, Inc. (August 15, 2006)
Mittal Steel USA (August 16, 2006)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and

Service Workers International Union, AFL-CIO-CLC (August 16, 2006)
United States Steel Corporation (August 16, 2006)

The Department received a complete and timely substantive response from certain domestic interested parties (United States Steel Corporation ("U.S. Steel"), Mittal Steel USA Inc. ("Mittal Steel USA"), Nucor Corporation ("Nucor"), Gallatin Steel Company, Steel Dynamics Inc., and IPSCO Steel Inc.) ("Domestic Producers") on August 31, 2006, within the deadline specified under section 351.218(d)(3)(i) of the Department's regulations. The Department also received a complete substantive response from Corus Staal on August 31, 2006. Corus Staal claimed interested party status as a foreign producer, under section 771(9)(A) of the Act, and 19 CFR 351.102(b). On September 8, 2006, the Department received rebuttal comments from U.S. Steel and from Corus Staal.

On September 20, 2006, the Department determined that domestic parties' and respondents' August 31, 2006, submissions constituted adequate responses to the notice of initiation, in accordance with section 351.218(e)(1)(ii) of the Department's regulations. See the September 20, 2006, memorandum from Robert James to Richard Weible entitled "Sunset Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Adequacy of Domestic and Respondent Interested Party Responses to the Notice of Initiation." As a result, the Department determined, in accordance with section 351.218(e)(3) of the Sunset Regulations, to conduct a full (240 day) review.

The Department extended the deadlines for the preliminary results of this review and the final results of this review to February 12, 2007, and June 22, 2007, respectively. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Extension of Time Limits for Preliminary and Final Results of Full Five-Year ("Sunset") Review of Antidumping Duty Order, 71 FR 67854 (November 24, 2006).

On February 16, 2007, the Department published a notice of preliminary results of the full sunset review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands pursuant to section 751(c) of the Act. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of the Sunset Review of Antidumping Duty Order, 72 FR 7604 (February 16, 2007) ("Sunset Review Preliminary Results"). We provided interested parties an opportunity to comment on our preliminary results.

On April 4, 2007, in response to a request by Corus Staal, the Department extended the deadlines for parties to file briefs and rebuttal briefs to April 16, 2007 and April 23, 2007, respectively. The Department received a case brief from Corus Staal on April 16, 2007. On April 23, 2007, in response to a request from U.S. Steel, the Department extended the deadline for parties to file rebuttal briefs to April 26, 2007, and on April 26, 2007, in response to another request from U.S. Steel, the Department extended the deadline for parties to file rebuttal briefs to April 27, 2007. The Department received rebuttal briefs from U.S. Steel, from Nucor, and from Mittal Steel USA on April 27, 2007. A hearing was not held because none was requested.

Subsequently, the Department revoked the order prospectively from April 23, 2007 (see Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 FR 25261 (May 4, 2007) ("Revocation of the Order")). Because revocation of an order pursuant to a first sunset review would be effective five years from the date of the order (i.e., November 29, 2006), the impact of this sunset review is limited to the period from November 29, 2006, through April 22, 2007 (the last day prior to the effective revocation date indicated above).

As a result of this sunset review, the Department cannot make a finding that revocation of this order would be likely to lead to continuation or recurrence of dumping. Consequently, the Department will revoke the order, effective November 29, 2006. See Department Position for Comment 1, below.

Discussion of the Issues

In accordance with section 751(c)(1) of the Act, the Department is conducting this sunset review to determine whether revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping. In accordance with section 751(d)(2)(A) of the Act, the Department will revoke an order or finding, or terminate a suspended investigation, **unless** it makes a determination that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur. As noted above, however, since the issuance of Sunset Review Preliminary Results, the order has been revoked prospectively from April 23, 2007.

We address the comments of the interested parties below.

Comment 1: Whether "other factors" require that the Department consider two recent WTO determinations with respect to zeroing.

Corus Staal argues that the Department, for purposes of making its final determination in this sunset review, must take into account Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Section 123 Determination") (in which, according to Corus Staal, the Department made its final modification of its zeroing policy pursuant to Section 123); and "Final Section 129 Determination" (in which the Department recalculated the investigation margin for Corus Staal without using zeroing, determined the margin to be zero percent, and indicated it would revoke the order on certain hot-rolled carbon steel flat products from the Netherlands prospectively from April 23, 2007).

Corus Staal argues that because section 751(d)(2) of the Act requires the Department in a sunset review to "revoke...an antidumping duty order or finding,...unless...{it} makes a determination that dumping...would be likely to continue or recur...," and, therefore, by definition the Department's analysis in a sunset review is a predictive exercise (citing Comm. for Fairly Traded

Venezuelan Cement v. United States, 372 F.3d 1284, 1286 (Fed. Cir. 2004), NMB Singapore Ltd. v. United States, 288 F. Supp. 2d 1306, 1351-52 (Ct. Int'l Trade 2003), and AG der Dillinger Huttenwerke v. United States, 193 F. Supp. 2d 1339, 1348 n.13 (Ct. Int'l Trade 2002)). Corus Staal states that where critical facts and circumstances have changed since an order went into effect, those facts, assuming they pertain to the future, must be taken into account. Further, Corus Staal maintains the Department, under section 752(c)(2) of the Act, must consider the information which is before it at the time it renders its final decision, citing AG der Dillinger Huttenwerke v. United States, 193 F. Supp 2d 1339, 1356-58 ("By requesting that Commerce consider changes affecting the original CVD rate, Plaintiffs are not asking Commerce to 'reject' its findings under the original investigation, or to change "retroactively" the results of the original or subsequent investigations," but "...the likelihood determination involves whether subsidies would be likely to continue or recur, thereby having an effect on imports entered after the effective date of the potential revocation order); Nucor Corp. v. United States, 318 F. Supp. 2d 1207, 1244 (Ct. Int'l Trade 2004); and SKF USA Inc. v. United States, 118 F. Supp. 2d 1315, 1326 (Ct. Int'l Trade 2000).

Corus Staal states that the recalculations in the "Final Section 129 Determination" are in accordance with U.S. law and must be applied to the sunset review, and notes that the Department, in Section 123 Determination at 77725, stated it had determined "to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date" of January 16, 2007.

Nucor argues that the Department erred in the "Final Section 129 Determination," as it believes zeroing is mandated by U.S. law (given that the statute identifies exactly what factors the Department may use to adjust the dumping margin (see, e.g., sections 772 and 773 of the Act), and offsetting for negative value-dumping is not one of them), and is fully explained in the accompanying Statement of Administrative Action ("SAA"). Nucor notes that the "Final Section 129 Determination" may be appealed to the U.S. Court of International Trade within thirty days after the publication of implementation of the determination in the Federal Register, and that the SAA states unequivocally that Section 129 determinations are not subject to judicial review until implementation.

Furthermore, Nucor argues that the underlying investigation margin and order are still valid, as the order has not been revoked and, as Corus Staal has conceded, "Final Section 129 Determination" has not been implemented. Nucor states that a Department Section 129 determination does not itself constitute a change in law but, rather, it only serves to inform and aid the USTR in deciding whether to seek a change in current U.S. law. Nucor suggests Corus Staal has conceded that the Department's final results in this sunset review should be in accordance with the law in effect at this time. Nucor argues that implementation of a Department Section 129 Determination may only occur after USTR has consulted with both the Department and the relevant congressional committees and then directed the Department to publish a notice of implementation in the Federal Register.

U.S. Steel also argues that the Department erred in "Final Section 129 Determination," as it believes zeroing is mandated by U.S. law. U.S. Steel notes that the Federal Circuit, in Timken Co. v. United States, 254 F.3d 1334 (Federal Circuit 2004), cert. denied, 543 U.S. 976 (2004) ("Timken"), found, at 1342, that based solely on the definitions in the relevant portions of section 771 of the Act, that it was a "close question" as to whether or not the statute mandated the use of zeroing, and that "at a minimum," it authorized the use of zeroing. U.S. Steel argues that Congress's establishment of different price-to-price comparison methodologies for investigations involving targeted dumping as opposed to those that do not involve targeted dumping (unchanged subsequent to the Uruguay Round negotiations, at which the United States sought to retain the alternative comparison methods) demonstrates that zeroing is required, because without zeroing, those two methodologies yield the same weighted-average margin which, in turn, would render the relevant portion of section 777A of the Act meaningless. U.S. Steel notes that the Supreme Court has repeatedly stated that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant" (see, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001)). U.S. Steel also notes "{t}he rules of statutory construction require a reading that avoids rendering superfluous any provisions of a statute" (see Ishida v. United States, 59 F.3d 1224, 1230 (Federal Circuit 1995) ("Ishida")).

U.S. Steel argues that the United States and three separate WTO panels have recognized that without zeroing, the results of the two methodologies referenced in the statute would always be exactly the same. U.S. Steel acknowledges that the Department has recently asserted that the results of the different methodologies (for targeted dumping investigations versus dumping investigations not involving targeted dumping) may not be the same, given that the Department has not used the targeted dumping methodology and has not indicated how it would apply such a methodology. U.S. Steel counters that there is nothing in the statute indicating that zeroing may be used for one type of investigation versus the other and, in any case, the relevant portion of section 777A of the Act dealing with non-targeted dumping calculations would still be nullified if zeroing is not used. U.S. Steel concludes that the recent developments cited by Corus Staal with respect to zeroing may not serve as the basis for a negative likelihood determination in this sunset review, because the Department's modification of it zeroing policy and the application of the modification, recalculating the underlying investigation margin without zeroing, are contrary to the statute and will likely be overturned on appeal.

Mittal Steel USA argues that the methodology adopted by the Department in "Final Section 129 Determination" is an unreasonable and impermissible construction of the statute. Mittal Steel USA argues that the Court upheld the reasonableness of the Department's long-standing zeroing methodology in Timken, finding only that it was a "close question" whether or not zeroing is required under the statute.

Mittal Steel USA argues that the Department's recent abandonment of zeroing in investigations, as reflected in "Final Section 129 Determination," is a departure from the reasonable interpretation of the statute upheld in Timken. Mittal Steel USA further suggests that new

methodology articulated in "Final Section 129 Determination" renders provisions of the statute describing alternative calculations of weighted-average margins meaningless under the mathematical equivalence argument, and is contradicted by other provisions in the statute that indicate that dumping margins, for purposes of calculated an overall weighted-average margin, cannot be "negative."

Mittal Steel USA notes that the United States (most recently in Communication from the United States, US- Zeroing (Japan), WT/DS322/16, at para. 11 (February 26, 2007)) and three WTO dispute settlement panels (see, e.g., Panel Report, US - Softwood Lumber V (Article 21.5), WT/DS264/R (April 3, 2006)), as well as the Council of the European Union and the Court of First Instance of the European Communities, have all recognized that if offsets are provided for instances where export price exceeds normal value, a respondent's dumping margin would mathematically always be the same regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value. This, Mittal Steel USA argues, would render the relevant portion of section 777A of the Act meaningless, contrary to the conclusion in Ishida that "{t}he rules of statutory construction require a reading that avoids rendering superfluous any provision of a statute."

Mittal Steel USA argues that support for interpreting the word "exceeds" in the relevant portion of section 771 of the Act to mean that normal value is greater than export price is provided elsewhere in the statute. Mittal Steel USA notes that the relevant portion of section 771 of the Act indicates that "{t}he terms 'dumped' and 'dumping' refer to the sale or likely sale of goods at less than fair value" (emphasis added), so no "negative dumping margins" can result in instances where export price exceeds normal value and, therefore, no such "margins" can be used to offset actual (positive) dumping margins. Mittal Steel USA also notes that the relevant portion of section 734 of the Act allows the Department to suspend an investigation if the exporters of the subject merchandise agree "to revise their prices to eliminate completely any amount by which normal value exceeds the export price (or the constructed export price) of that merchandise" (emphasis added); interpretation of "exceeds" to mean "less than" would indicate that parties to such a suspension agreement would be required to commit to matching export price and normal value precisely, without variance.

Department Position:

The Department agrees with Corus Staal that the Department's final determination in this sunset review should account for "Final Section 129 Determination." Furthermore, since the submission of rebuttal briefs in this sunset review, the Department has revoked the order prospectively from April 23, 2007. See Revocation of the Order.

Section 751(d)(2) of the Act requires the Department in a sunset review to "revoke...an antidumping duty order or finding,...unless...{it} makes a determination that dumping...would be likely to continue or recur...." Thus, the finding of likelihood is contingent upon an analysis of what would happen if an order is revoked. This presumes the existence of an antidumping duty order currently in force, which is manifestly not the case here. Consequently, in the absence of an order currently in force, the Department cannot make a finding that it is likely that dumping will continue or recur if the order is revoked.

Furthermore, in accordance with § 351.222(i)(2)(i) of the Department's regulations, the order will be revoked effective November 29, 2006, the fifth anniversary of the date of publication in the Federal Register of the order.

With respect to the arguments of Nucor, U.S. Steel, and Mittal Steel USA regarding the validity of the Final Section 129 Determination, any decision the Department takes under a particular statute is valid unless it is vacated by a court. Courts have found that the Department's determinations are presumed valid and accurate, notwithstanding any pending challenges, until there is a final and conclusive court decision holding otherwise. See American Silicon Technologies v. United States, 273 F. Supp. 2d 1342, 1346 (CIT 2003) (where the court upheld the Department's use as an adverse facts available rate of a margin calculated for another company during a prior administrative review, though that rate was subject to an appeal at the time); D&L Supply Co. v. United States, 113 F3d 1220, 1224 (Fed. Cir. 1997) (where the court held that although the Department cannot rely upon a prior margin that has been conclusively invalidated by the courts, a margin that has not been overturned is presumed accurate); and Carpenter Tech. v. United States, 474 F. Supp. 2d 1347 (CIT 2007) (where the court upheld the Department's decision to use prior zero or de minimis margins in support of partial revocation of an order, though those margins were subject to appeals at the time).

Finally, as a result, all other issues that were raised by Corus Staal BV are moot.

Comment 2: Whether the Department's conclusion in Final Section 129 Determination to revoke the order undermines the validity of Sunset Review Preliminary Results.

Corus Staal argues that the preliminary determination not to revoke referenced in Sunset Review Preliminary Results rested in part upon the fact that the Department "has never revoked" the underlying order. Corus Staal points out that, since Sunset Review Preliminary Results, the Department issued "Final Section 129 Determination," in which the Department stated that the weighted-average margin from the underlying investigation was being decreased "from 2.59 percent to zero" and that the underlying "order will be revoked." See "Final Section 129 Determination" at 23.

Nucor, U.S. Steel, and Mittal Steel USA argue that the order has not been revoked, and that the Department's elimination of zeroing in "Final Section 129 Determination" was contrary to law. Nucor and U.S. Steel add that "Final Section 129 Determination" has not been implemented and may be appealed to the U.S. Court of International Trade.

Department Position: As noted above, the order on certain hot-rolled carbon steel flat products from the Netherlands has been revoked prospectively from April 23, 2007. Hence, we can make no finding with respect to likelihood, rendering this issue moot (see the Department Position for Comment 1, above).

Comment 3: Whether the Department's implementation in "Final Section 129 Determination" of WTO rulings pertaining to zeroing undermines the validity of Sunset Review Preliminary Results.

Corus Staal states that the WTO rejected the Department's zeroing methodology in Panel Report, United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (October 31, 2005), as modified by Appellate Body Report, United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (April 18, 2006) (collectively, "WTO Zeroing"). Corus Staal states that, subsequent to the Sunset Review Preliminary Results, the effective date passed for the elimination of "zeroing" in investigation weighted-average margin calculations (pursuant to Section 123 Determination), and the Department implemented this change with respect to the investigation calculations for Corus Staal with respect to this order, yielding a weighted-average margin of zero (as noted in "Final Section 129 Determination"). Corus Staal implies that these events constitute the Department's completion of the statutorily mandated process of determining how to implement WTO Zeroing and, therefore, this rationale for the positions stated in Sunset Review Preliminary Results no longer exists.

Nucor, U.S. Steel, and Mittal Steel USA note that the order has not been revoked, and that the Department's elimination of zeroing in "Final Section 129 Determination" was contrary to law. Nucor and U.S. Steel add that "Final Section 129 Determination" has not yet been implemented and may be appealed to the U.S. Court of International Trade. Nucor, U.S. Steel, and Mittal Steel USA indicate that the Department has not, and should not, take any affirmative actions with respect to zeroing that would negate or otherwise modify the final results of the administrative reviews, which in turn formed part of the basis of the Department's conclusion in Sunset Review Preliminary Results.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 4: Whether the recalculated weighted-average margin of zero percent for Corus Staal in "Final Section 129 Determination" undermines the "likely margin to prevail" if the order were revoked that was referenced in Sunset Review Preliminary Results.

Corus Staal argues that "Final Section 129 Determination," in correcting the weighted-average margin for Corus Staal for the investigation (from 2.59 percent to zero percent), undermines the Department's conclusion in Sunset Review Preliminary Results that the likely margin to prevail if the order were revoked is 2.59 percent. Corus Staal states that the Department's change in practice, as identified in Section 123 Determination and implemented in "Final Section 129 Determination," prevents the Department from finding any margin other than zero with respect to the original investigation. Corus Staal notes that the Department, when deciding the likely margin to prevail if the order were revoked, "normally will select dumping margins...determined in the original investigation or in a prior review," and that "Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order or suspension agreement in place." See the SAA accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Rep.

No. 103-316, Vol. 1, at 890-891. Corus Staal states that the Department was correct in Sunset Review Preliminary Results in its determination that an investigation rate was the margin likely to prevail if the order were revoked, but the intervening changes in U.S. law and the recalculation of the investigation margin mandate that a different investigation margin (i.e., zero percent) be provided to the ITC.

Corus Staal also argues that the Department may no longer rely on the rationale that the 2.59 percent margin has been upheld by the Federal Circuit, because the Federal Circuit's decision stated the 2.59 percent margin would stand "unless and until {the WTO} ruling has been adopted pursuant to the specified statutory scheme." See Corus Staal BV v. United States, 395 F.3d 1343, 1349 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006). Corus Staal states that this prerequisite has been satisfied, but for the directive from the United States Trade Representative ("USTR") to the Department to implement the determination.

Nucor, U.S. Steel, and Mittal Steel note that the order has not been revoked, and that the Department's elimination of zeroing in "Final Section 129 Determination" was contrary to law. Nucor and U.S. Steel add that "Final Section 129 Determination" has not been implemented and may be appealed to the U.S. Court of International Trade. Nucor notes that the investigation margin of 2.59 percent is the margin that is likely to prevail if the order is revoked.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 5: Whether the Department may rely on the presumptions embodied in Sunset Review Policy Bulletin.

Corus Staal argues that the Department cannot simply rely on the presumptions embodied in Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871, 18872 (April 16, 1998) ("Sunset Review Policy Bulletin"). Corus Staal argues that the Department is obligated by section 751(d)(2) to revoke an antidumping duty order unless there is substantial evidence of record demonstrating that dumping would be likely to continue or recur in the absence of an order, and that the presumptions in the Sunset Review Policy Bulletin do not meet that requirement.

Corus Staal states that AG der Dillinger Huttenwerke v. United States, 193 F. Supp 2d 1339 (Court of International Trade 2002) ("Dillinger v. United States") indicates that the Department may not merely rely on the original dumping margin to establish a likelihood of continuation or recurrence of dumping.

Corus Staal also argues that Appellate Body Report, United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (December 15, 2003) ("Corrosion-Resistant from Japan") makes several points that support Corus Staal's contention that the Department may not based its results solely upon the presumptions in Sunset Review Policy Bulletin:

> "We believe that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of

dumping," and "{s}uch a determination cannot be based solely on the mechanistic application of presumptions...." (at 178).

"This {Article 11.3}...suggests to us that authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply," and "...that the drafters of the Anti-Dumping Agreement saw the sunset review as a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities...." (at 113)

"The text of Article 11.3 contains an obligation 'to determine' likelihood of continuation or recurrence of dumping and injury," that "{t}he requirement to make a 'determination' concerning likelihood...precludes an investigating authority from simply assuming that likelihood exists," and that, to continue an order, "it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury." (at 114-15).

Corus Staal states that Appellate Body Report, United States - Sunset Reviews of Anti-Dumping Measures on Oil Tubular Goods from Argentina, WT/DS268/AB/R (December 17, 2004) found that Sunset Review Policy Bulletin, including the presumptions therein, can be challenged as a WTO-inconsistent measure, and that Panel Report, United States - Sunset Reviews of Anti-Dumping Measures on Oil Tubular Goods from Mexico, WT/DS282/R (June 20, 2005) at paragraph 8.1 found that the Department's reliance on the factors listed in Sunset Review Policy Bulletin improperly establish an irrebutable presumption of continuation or recurrence of dumping in the absence of an order.

Nucor states that the Department was correct, in Sunset Review Preliminary Results, in its conclusion that Dillinger v. United States is not pertinent in this context because that case involved a countervailing duty order. Nucor states that none of the WTO cases cited by Corus Staal establishes that the Department's consideration of import volume levels and weighted average dumping margins determined in the investigation and subsequent reviews is WTO-inconsistent, and notes that Corus Staal conceded that in one case it cites (Corrosion-Resistant from Japan) the WTO found that the Department's affirmative determination in a sunset review was properly based on the Department's analysis of the respondent's dumping margins and import levels. Finally, Nucor notes that even if the WTO had found the Department's consideration of such factors to be WTO-inconsistent, a WTO determination is not binding unless the U.S. Government has affirmatively adopted those findings as U.S. law.

U.S. Steel also notes that Dillinger v. United States pertained to a countervailing duty order, not an antidumping duty order, and in that decision the Court of International Trade held that the Department could not rely on the subsidy rates determined for a company in the original investigation to establish likelihood where there were certain factors present that are unique to countervailing duty cases. See Dillinger v. United States at 1349-50 and 1361-62. U.S. Steel states that, even if Dillinger v. United States had any relevance here, the Department's decision in Sunset Review Preliminary Results did not rely upon the investigation margin to establish likelihood of continuation or recurrence of dumping. With respect to the WTO rulings cited by

Corus Staal, U.S. Steel states that they do not indicate that the Sunset Review Policy Bulletin improperly establishes a conclusive and irrebuttable presumption of likelihood. U.S. Steel states that the WTO Appellate Body has specifically rejected such a finding and has upheld the Department's Sunset Review Policy Bulletin in no less than three separate cases (see Appellate Body Report, United States - Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico, WT/DS282/AB/R (November 2, 2005) at para. 219(e); Appellate Body Report, United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R (November 29, 2004) at para. 365(b); and Appellate Body Report, United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (December 15, 2003) at paras. 157, 209, 211, 212(e)). In this last decision, U.S. Steel says, even Corus Staal acknowledged in its brief that the WTO Appellate Body upheld the Department's finding of likelihood based on the presence of above de minimis margins and a decline in volume of imports after issuance of the order.

Mittal Steel USA states that the statute mandates that evidence of continued dumping and declining import volumes be considered by the Department. With respect to Sunset Review Policy Bulletin, Mittal Steel USA states that the WTO decisions cited by Corus Staal did not find Sunset Review Policy Bulletin to be WTO-inconsistent and, even if there were an adverse WTO decision on point, such decisions are not self-executing and have no automatic applicability to U.S. law.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 6: Whether the Department's decision in "Final Section 129 Determination" to revoke the order means that Corus Staal will not dump in the future.

Corus Staal states that the Department's decision to revoke the order, as recorded in "Final Section 129 Determination," effectively "means that Corus will not be engaging in any activity that can legally be characterized as 'dumping'." In addition, Corus Staal argues that an investigation margin of zero means there will be no dumping in the future, citing Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 FR 34899 (May 16, 2002) ("PET Film from India"), which states at 34901 that "if the Department's calculation in an investigation results in a zero rate, then in reality, there exists no dumping upon which an {order} can be based."

Nucor, U.S. Steel, and Mittal Steel USA argue that the order should not be revoked, regardless of the Department's decision in "Final Section 129 Determination," and that the above de minimis margins found for Corus Staal in administrative reviews constitutes evidence which, on its own, is sufficient to show that dumping is likely to continue in the absence of an order.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 7: Whether the Sunset Review Policy Bulletin presupposes a validly issued order and would not apply in the absence of a validly issued order.

Corus Staal argues that the Department cannot find dumping likely to recur based on the standard three factors (above de minimis margins and/or cessation of imports after issuance of order and/or significant decline in imports) identified in Sunset Review Policy Bulletin because a valid order will not exist upon USTR's instruction to the Department. Without a valid antidumping determination in the original order, Corus Staal insists there can be no valid determination in a later review. Corus Staal cites Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571, 1577 (Fed. Cir. 1990) ("Colombian Flowers") as finding that "without a valid antidumping determination in the original order, there can be no valid determination in a later annual review," and states that determinations by the Department pursuant to a now unlawful order, including margins from administrative reviews, are invalid. Corus Staal states that to hold otherwise, the Department would be giving effect to the results of the administrative reviews beyond the date of the revocation of the order, which would be a result in contravention of the dictates of the Federal Circuit in the aforementioned case.

Corus Staal also cites Jilin Henghe Pharm. Co. V. United States, 342 F. Supp. 2d 1301, 1309-10 (Ct. Int'l Trade 2004), vacated as moot, 123 Fed. Appx. 402 (Fed. Cir. 2005), as finding that once a dumping determination is invalidated, it cannot serve as a legal basis for imposition of antidumping duties, and Asahi Chem. Indus. Co., Ltd. v. United States, F. Supp. 625, 627 (Ct. Int'l Trade 1989) as finding that "a revocation determination of Commerce quashes the effect of an antidumping duty order...."

Nucor, U.S. Steel, and Mittal Steel USA insist that the order should not be revoked and, in any case, has not been revoked. They also note that the Department is statutorily obligated under the relevant portion of section 752 of the Act to consider the weighted-average dumping margins determined in the investigation and subsequent reviews and the volume of imports of subject merchandise for the period before and the period after the issuance of the order when determining whether it would be likely that the revocation of the order would lead to the continuation or recurrence of dumping.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 8: Whether the Department may rely on margins calculated in administrative reviews based on zeroing.

Corus Staal argues that even if one were to consider margins from administrative reviews (despite the absence of a valid order), the administrative review margins relied upon by the Department in its preliminary sunset review results are unreliable because they reflect calculations based on methodology that employed zeroing. Corus Staal states that such review margins have been found to be WTO-inconsistent in 16 specific administrative reviews (see Appellate Body Report, United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (April 18, 2006) ("EC WTO") at paragraphs 263(a)(i), and suggests that paragraph 2.6 of Panel Report, United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (October 31, 2005)

had extended the European Communities' challenge to all assessment instructions issued pursuant to any of the 15 antidumping duty orders set forth in footnote 119 of the report.

Corus Staal argues that zeroing was found WTO-inconsistent more generally – an "as such" basis – in a more recent WTO Appellate Body decision (see Appellate Body Report, United States - - Measures Related to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) ("Japan WTO") at paragraph 156. With respect to Japan WTO, Corus Staal notes that the United States has indicated that it "intends to comply in this dispute with its WTO obligations and will be considering carefully how to do so" (see "Press Release of the U.S. Mission to the United Nations in Geneva, U.S. Statement at the WTO Dispute Settlement Body Meeting" at Item 2 (February 20, 2007)). Corus Staal also states that the United States' use of zeroing in sunset reviews was found on an "as applied" basis to be in violation of Article 11.3 of the Antidumping Agreement (see Japan WTO at 185), because these likelihood determinations had been based on margins calculated in administrative reviews in which the Department impermissibly zeroed, thus, in turn, tainting the results of the sunset review. Corus Staal notes that the WTO Appellate Body had previously found that WTO-inconsistent methodologies employed in one phase of a proceeding can taint the outcome of subsequent phases of the proceeding, such as sunset reviews (see Appellate Body Report, United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R at paragraph 127 (December 15, 2003), which stated that "{i}f... margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with article 2.4, but also with Article 11.3 of the Antidumping Agreement," governing sunset reviews).

In addition, Corus Staal notes that the European Communities have filed a request for consultation with the WTO contesting the zeroing methodology employed by the United States in the first and second administrative reviews of Corus Staal under the order (the only two administrative reviews that had been completed as of the time of Corus Staal's submission of its brief). Corus Staal asserts that "{t}his dispute will, without question, find the margin calculations in the first and second administrative reviews to be WTO-inconsistent."

Finally, Corus Staal asserts that if zeroing is eliminated, the weighted-average margins for the three administrative reviews (the completed first and second administrative reviews, and the uncompleted (as of the time of Corus Staal's submission of its brief) fourth administrative review) would be negative. Corus Staal concludes that, notwithstanding the unlawfulness of the original order, it is impossible for the Department to conclude that dumping margins above de minimis levels have continued after the issuance of the order and, therefore, those unlawfully calculated review margins are not evidence that revocation of the order is likely to lead to the continuance or recurrence of dumping.

Nucor notes that the Department, regardless of its errors in "Final Section 129 Determination," has not taken any affirmative actions to negate or otherwise modify the results of the administrative reviews with respect to zeroing. Nucor argues that both the URAA and accompanying SAA make it clear that the results of the Section 129 determination would only apply to the original investigation, and not to administrative review periods prior to the implementation date for the Section 129 determination; the latter would have prospective effect

only with respect to unliquidated entries, applying only to those that are entered, or withdrawn from warehouse for consumption on or after the date on which USTR directs the Department to implement the determination. See 19 U.S.C. 3538(c)(1) and SAA at 1026. Nucor notes that the Department has recognized that U.S. law prohibits the retroactive application of Section 129 determinations, citing Countervailing Measures Concerning Certain Softwood Lumber Products from Canada, 69 FR 75305, 75306 (December 16, 2004); Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 FR 64858, 64859 (November 17, 2003); and Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 67 FR 71936, 71939 (December 3, 2002). Finally, with respect to Corus Staal's assertion that the European Commission has requested consultation with the WTO regarding the zeroing methodology used in certain administrative reviews, including those at issue in this proceeding, Nucor states that the WTO has not issued a report on this matter but, even if it had, appropriate statutory process would have to be conducted for there to be any impact on U.S. law.

U.S. Steel argues that in EC WTO the WTO Appellate Body rejected the Department's use of zeroing, but that decision was only "as applied" to the facts in the 16 administrative reviews in question, and did not find that zeroing was inconsistent on an "as such" basis. With respect to Japan WTO, U.S. Steel argues that it is not clear whether and, if so, how the United States will implement that decision and, furthermore, any such implementation of that decision, if it were to occur, would be done on a prospective basis only after specific statutory steps established for such implementation under the law (citing 19 U.S.C. section 3538(c)(1)(B) 2000; SAA at 1026, reprinted in 1994 U.S.C.C.A.N. at 4313).

Mittal Steel USA states that the United States has indicated to the WTO Dispute Settlement Body in United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Status Report of the United States, Addendum, WT/DS294/20/Add.2, at 2 (April 13, 2007) that "no further action is necessary" with respect to the administrative reviews challenged in EC WTO because "in each case the results were superseded by subsequent reviews."

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 9: Whether domestic producers' withdrawals of administrative review requests prevented meaningful analysis of import and margin trends.

Corus Staal states that the domestic producers withdrew their requests for review in the third and fifth administrative reviews after reviewing Corus Staal's sales data. Corus Staal claims that it is obvious the requests for review were withdrawn because petitioners' analyses yielded margin rates substantially below the rates at which Corus deposited estimated duties. Corus Staal states that domestic producers should not now be able to benefit from having withdrawn requests for reviews in years in which the results would clearly undermine their position. Corus Staal asserts that those reviews, if completed, would have shown declining margins (even under the unlawful zeroing methodology) as well as increasing import levels. Corus Staal states that the Department cannot rely on "the distorted import and margin data in the record as it did in the Preliminary

Results," that is, the existence of non-de-minimis weighted-average margins in the first and second administrative review periods.

Nucor, U.S. Steel, and Mittal Steel USA all indicate that the absence of completed reviews for the third and fifth administrative review periods has no bearing on the analysis, as the Department found above de minimis margins for other review periods. Mittal Steel USA notes that there is no statutory requirement that mandates that a respondent be reviewed in every review period in order for the Department to conclude that dumping is likely to continue or recur. Nucor, U.S. Steel, and Mittal Steel USA all note that, regardless of petitioners' withdrawals of review requests for the third and fifth review periods, Corus Staal had an opportunity to timely request an administrative review for those periods, but did not do so. U.S. Steel adds that any speculations regarding petitioner motives for withdrawing review requests for certain review periods is meaningless, as there is no basis to even surmise what margins for such periods might have been.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 10: The impact of the Section 201 tariffs on steel product imports.

Corus Staal argues that the Department failed in Sunset Review Preliminary Results to consider the impact of the Section 201 steel investigations. The Section 201 steel investigations were initiated one month into the first period of review, and resulted in temporary safeguard measures in the form of tariffs imposed about half-way through the first period of review (March 20, 2002) and lasting until about one month into the third period of review (December 4, 2003). Corus Staal claims that these tariffs impacted U.S. imports of Corus Staal hot-rolled carbon steel flat products, and must be accounted for when considering import trends after the order went into effect. Corus Staal claims that the Department's failure to consider the impact of those special tariffs on import volumes was in violation of the Department's statutory mandate to "consider other factors" that may indicate that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping.

Nucor, U.S. Steel, and Mittal Steel USA all note that the Department, in Sunset Review Preliminary Results, clearly explained that import volumes for calendar years during which the safeguard measures were not in effect were all lower than import volumes for pre-order calendar years. U.S. Steel adds that Corus Staal has not made any showing as to how the safeguard measures affected its imports even during the limited time during which they were in effect.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Comment 11: The significance of declining margins and steady (or rising) imports.

Corus Staal contends that import volumes remained steady (on a quantity basis) and rose (on a value basis) once one accounts for the market disruption caused by the Section 201 steel investigations and resulting tariffs (see Comment 10). Corus Staal states that a comparison of import volumes in 2001 (which it characterizes as largely pre-order) and 2006 shows only "a very small drop" of about 10 percent, and that on a value basis the 2006 level is about 140

percent greater than the 2001 level. Corus Staal argues that in the second review period (roughly the calendar year 2003), "at the height of the Section 201 temporary measures," its imports dropped to their lowest levels in the post-order period. Corus Staal argues that once this disruption is accounted for, import volumes were steady during the years of the order.

Corus Staal states that while import volumes were steady during the years of the order, weighted-average margins were declining to levels much lower than that from the original investigation even if one accepts the flawed zeroing methodology. Corus Staal estimates that the third administrative review period margin would have been 3.40 percent, and the fifth administrative review period margin would have been 0.90 percent, which would indicate weighted-average margins fell steadily from a high of 4.80 percent for the first administrative review period, to an estimated 0.90 percent in the fifth administrative review period.

Corus Staal concludes that none of the indicia utilized by the Department to determine whether revocation of an order is likely to lead to the continuation or recurrence of dumping is satisfied with respect to Corus Staal sales of subject merchandise.

Nucor states that the Department found dumping at above de minimis levels in the two completed reviews (for the first and second administrative review periods), and in the preliminary results for the fourth administrative review period. Nucor also states that Corus Staal import levels after the order went into effect declined significantly from pre-order years. Nucor states that the Department must reject Corus Staal's suggestion that it use 2001 as the base period for comparison, as the Department is statutorily required to compare import volume levels prior to the discipline of the order with import levels after the issuance of the order (see the relevant portion of section 752 of the Act). Nucor notes that Corus Staal has provided no justification for deviating from established practice, and considering trends in import values rather than import volumes.

U.S. Steel states that the Department normally will determine that dumping is likely to continue upon revocation of an antidumping duty order where dumping continued at any level above de minimis after the issuance of the order, or if the volume of imports declined significantly after the issuance of the order. With respect to dumping margins, U.S. Steel notes that the Department has determined that Corus Staal dumped the subject merchandise at a level well above de minimis in each of the administrative reviews of the order it has completed and, in fact, that the margins were significantly higher than that from the underlying investigation. U.S. Steel also notes that the Department has found an above de minimis weighted-average margin for Corus Staal in its preliminary results for the fourth administrative review period. U.S. Steel maintains that any speculation regarding petitioner motives for withdrawing review requests for certain review periods is meaningless, as there is no basis to even surmise what margins for such periods might have been.

With respect to trends in import volumes, U.S. Steel states that import volumes declined whether one looks at volumes based on periods corresponding to administrative review periods or based on calendar years. U.S. Steel argues that Corus Staal's emphasis on the rise in volume between 2003 (the "height of the Section 201 temporary measures") through 2004 and 2005 is misplaced, as the base period for the analysis may not be a year in which the antidumping order was in effect

(see Issues and Decision Memorandum in Paper Clips from the People's Republic of China; Notice of Final Results of Expedited Sunset Review of Antidumping Duty Order, 70 FR 67433 (November 7, 2005) at Comment 1, and Final Results of Expedited Sunset Reviews: Certain Circular Welded Non-Alloy Steel Pipe From Brazil, the Republic of Korea, Mexico, Taiwan, and Venezuela, 64 FR 67854, 67857 (December 3, 1999)). Rather, U.S. Steel contends, the Department practice is to use as a base period one prior to the initiation of the investigation, citing, e.g., Issues and Decision Memorandum in Structural Steel Beams from Japan and South Korea, 70 FR 53633 (September 9, 2005) at Comment 1, and Final Results of Expedited Sunset Review: Stainless Steel Wire Rods From India, 65 FR 5315, 5316-17 (February 3, 2000).

Regarding the alleged impact of the Section 201 measures upon import volumes, U.S. Steel notes that Corus Staal did not show how those safeguard measures affected its imports while the tariffs were in effect and, in any case, those measures were not in effect during any part of 2001, 2004, and 2005, years in which the order was in effect and in which Corus Staal import volumes were significantly below pre-order levels.

Finally, U.S. Steel notes that Corus Staal provided no basis for analyzing import value trends rather than import volume trends, as myriad factors may affect the value of imports over time. U.S. Steel notes section 752(c)(1) of the Act expressly provides for the Department to consider volume.

Mittal Steel USA states that Corus Staal had above de minimis margins in the two completed administrative reviews, and those margins were even above those in the underlying investigation. Further, those margins were upheld in the courts. Mittal Steel USA argues that Corus Staal's attempts to calculate its own margin for the fifth review period in order to show declining margins are without basis, as that review was rescinded. With respect to import volumes, Mittal Steel USA states that the data provided by Corus Staal as well as domestic producers demonstrated that import levels declined significantly between pre-order years and years after the order went into effect, even if one did not consider the years in which the Section 201 safeguard measures were in effect.

Department Position: This issue is moot (see the Department Position for Comment 1, above).

Final Results of Review

We cannot determine that revocation of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands would be likely to lead to continuation or recurrence of dumping, as noted in the Department Position of Comment 1, above. Consequently, in accordance with section 751(d)(2) of the Act, the Department will revoke this order, effective November 29, 2006. See Department Position for Comment 1, above.

Recommendation

Based on our analysis and consideration of the case and rebuttal briefs received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the revocation of the order (effective November 29, 2006) in the Federal Register.

AGREE _____ DISAGREE_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date